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In the
Supreme Court of the United States
October Term, 1984

No._____

Johnny Sagona, Petitioner

v.

State of Louisiana, Respondent

Petition for Writ of Certiorari to the Louisiana Supreme Court

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December 12, 1984

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October Term, 1984

No._____

Johnny Sagona, Petitioner

v.

State of Louisiana, Respondent

Petition for Writ of Certiorari to the Louisiana Supreme Court

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Petitioner, Johnny Sagona, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court, State of Louisiana, entered in these proceedings on September 14, 1984

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QUESTIONS PRESENTED

1) Whether the State's failure to respond to requested discovery material violated petitioner's right to a fair trial under the due process clause of the United States Constitution?

OPINION BELOW

The judgment of the Louisiana Supreme Court was rendered without opinion of said court and a copy of that judgment appears in the Appendix hereto.

The judgment of the Court of Appeal of Louisiana, First Circuit, affirmed the conviction of petitioner and this opinion is found in *State v. Sagona*, 451 So.2d 1171 (La.App. 1 Cir. 1984), a copy of which appears in the Appendix hereto.

JURISDICTION

The judgment of the Louisiana Supreme Court was entered on September 14, 1984. A timely Application for Extension of Time in Which to File Petition for Writ of Certiorari was filed with this Honorable Court within the sixty (60) day period for filing application of certiorari.

The November 14, 1984 expiration date for filing was thereafter extended thirty (30) days, or until December 14, 1984 by the Honorable Byron R. White, Associate Justice of the United States and Circuit Justice for the Fifth Circuit. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTORY PROVISIONS INVOLVED

U.S.C.A. Const. Amend. 5:

Criminal actions — Provisions concerning — due process of law and just compensation.

No person shall be held to answer a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S.C.A. Const. Amend 15, Section 1:

Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

LSA-C.Cr.P. Art. 716:

Statements by the defendant.

A. Upon motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect and copy, photograph or otherwise reproduce any relevant written or recorded confession or statement of any nature, including recorded testimony before a grand jury, or copy thereof, of the defendant in the possession, custody, control, or knowledge of the district attorney.

B. Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the existence, but not the contents, of any oral confession or statement of any nature, made by the defendant, which the district attorney intends to offer in evidence at the trial, with the information as to when, where and to whom such oral confession or statement was made.

C. Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the substance of any oral statement which the state intends to offer in evidence made by the defendant, whether before or after arrest, in response to interrogatories by any person then known to the defendant to be a law enforcement officer.

LSA-C.CR.P. Art. 718:

Documents and tangible objects.

Subject to the limitation of Article 723, on motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect, copy, examine, test scientifically, photograph, or otherwise reproduce books, papers, documents, photographs, tangible objects, buildings, places, or copies or portions thereof, which are within the possession, custody, or control of the State, and which:

(1) are favorable to the defendant and which are material and relevant to the issue of guilt or punishment, or

(2) are intended for use by the state as evidence at the trial, or

(3) were obtained from or belong to the defendant.

The court may determine whether evidence is subject to the provisions of Paragraph (1) hereof by in camera inspection.

LSA-C.CR.P. Art. 729.5.

Failure to comply; sanctions.

A. If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this Chapter or with an order issued pursuant to this Chapter, the court may order such party to permit the discovery or inspection,grant a continuance, order a mistrial on motion of the defendant, prohibit the party from introducing into evidence the subject matter not disclosed, or enter such other order, other than dismissal, as may be appropriate.

B. In addition to the sanctions authorized in Part A hereof, if at any time prior or subsequent to final disposition the court finds that either the state through the district attorney or assistant district attorney or the defendant or his counsel has willfully failed to comply with this Chapter or with an order issued pursuant to this Chapter, such failure shall be deemend to be a constructive contempt of court.

STATEMENT OF CASE

Petitioner, Johnny Sagona, was found guilty by a six member jury before the 18th Judicial District Court, Parish of West Baton Rouge, Louisiana, of the crime of theft, a violation of LSA-R.S. 14:67. In this prosecution the State alleged that petitioner committed theft of approximately 8,000 gallons of gasoline having a value of over $500.00.

Prior to the trial of this matter, petitioner entered a plea of not guilty before the court. Thereafter, on or about June 16, 1982, petitioner filed a Motion for Bill of Particulars and a Motion for Discovery. The Motion for Bill of Particulars was answered by the

State on January 13, 1983, however, the Motion for Discovery was never answered by the State and the record is void of any disposition whatsoever on said motion.

On March 23, 1983, petitioner filed a Motion to Dismiss alleging that the State failed to produce the requested discovery material and as such violated his right to a fair trial. This motion was denied by the court on April 21, 1983, and petitioner then applied for Supervisory Writs to the First Circuit Court of Appeal presenting the same issue. This application was denied on the ground that petitioner had adequate remedy on appeal.

On June 23, 1983, the jury found petitioner guilty of theft and on September 8, 1983, petitioner filed a Motion for New Trial which was heard and denied by the court that same day.

Thereafter, petitioner lodged an appeal with the First Circuit Court of Appeal, State of Louisiana, alleging that the failure of the State to respond to requested discovery material violated his right to a fair trial. The court rejected petitioner's contention upholding the conviction and sentence.

Petitioner then applied to the Louisiana Supreme Court for Supervisory Writs which were denied without opinion of said court.

ARGUMENT

Petitioner, Johnny Sagona, avers that he has been denied the right to a fair trial as provided for in the due process clause of the United States Constitution. Petitioner formulates this contention on the State's failure to respond to a timely filed motion for Discovery and moreover, on the court's failure to dispense with the pending Motion for Discovery before the court.

In the case sub judice, the record reveals that petitioner filed a Motion for Discovery on June 16, 1982, a copy of which appears in the Appendix hereto. This motion was filed in accordance with LSA-C.Cr.P. Art. 716 et seq, which states that:

> "A. Upon motion of the defendant, the court shall order the district attorney to permit or authorize the defendant to inspect and copy, photograph or otherwise reproduce any relevant written or recorded confession or statement of any nature, including recorded testimony before a grand jury, or copy thereof, of the defendant in the possession, custody, control, or knowledge of the district attorney.
>
> "B. Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the existence, but not the contents, of any oral confession or statement of any nature, made by the defendant, which the district attorney intends to offer in evidence at trial, with the information as to when, where and to whom such oral confession or statement was made.
>
> "C. Upon motion of the defendant, the court shall order the district attorney to inform the defendant of the substance of any oral statement which the state intends to offer in evidence made by the defendant, whether before or after arrest, in response to interrogation by any person then known to the defendant to be a law enforcement officer."

The gist of petitioner's claim is governed by LSA-C.Cr.P.

Art. 718, which states that:

> "Subject to the limitation of Article 723, on motion of the defendant, the court shall under the district attorney to permit or authorize the defendant to inspect, copy, examine, test scientifically, photograph, or otherwise reproduce books, papers, documents, photographs, tangible objects, buildings, places, or copies or portions thereof, which are within the possession, custody, or control of the state and which:
>
> (1) are favorable to the defendant and which are material and relevant to the issue of guilt or punishment, or
>
> (2) are intended for use by the state as evidence at the trial, or
>
> (3) were obtained from or belong to the defendant.
>
> "The court may determine whether evidence is subject to the provisions of Paragraph (1) hereof by in camera inspection.

The pre-trial motions were scheduled for hearing before the court on July 27, 1982, and at that time the court continued said hearing without date, to be reassigned. It must be noted that thereafter this matter was rescheduled and continued on several occasions by the state and by defendant's failure to appear. However, a clear review of the entire records reveals that there was no disposition of the Motion for Discovery. Furthermore, the record is void of an order by the court directing the district attorney to comply with petitioner's request for discovery material as provided for in LSA-C.Cr.P. Article 716 and 718.

After the time period that the Hearing of Motions were continued petitioner filed a Motion to Dismiss on March 23, 1983, and this matter was heard

by the court on April 21, 1983. At this hearing petitioner avered that the suppression and/or non-disclosure of evidence favorable to the accused violated his right to due process of law. The court denied petitioner's motion to dismiss that same day and proceeded with the prosecution of petitioner.

Thereafter, the court on June 20, 1983, held a hearing on petitioner's motion to suppress and denied same. The trial commenced on June 21, 1983, which resulted in a verdict of guilty on June 21, 1983.

Petitioner now avers and would show that the failure of the State to provide requested discovery material and the failure of the court to order such discovery and/or dispense with the pending motion before the court violates his right to trial under the due process clause of the United States Constitution. In *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1195, 10 L.Ed.2d 215 (1963), this Honorable Court held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution. Moreover, in *United States v. Agurs,* 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d (1976), the court noted that when a general request for discovery material is made there is no breach of the prosecutor's constitutional duty to disclose unless the nondisclosure deprived the defendant of a fair trial.

Throughout these proceedings petitioner has maintained that the State failed to comply with his request for exculpatory evidence. Petitioner's request for exculpatory evidence was founded on LSA-C.Cr.P. Art. 718, in which petitioner requested authorization from the court to permit inspection, copying, examination, scientific testing, or photographing of all books, papers, or documents, photographs and tangible objects

within possession, custody or control of the State, and which were favorable to the defendant and which were material and relevant to the issue of guilt or punishment, and were intended for use by the State as evidence at trial.

Despite this request, the State failed to provide the requested material and in fact failed to answer petitioner's discovery request when the record itelf verifies petitioner's contention of exculpatory evidence in possession of the State. During the hearing on the motion to dismiss, the prosecutor informed the court on page 28, line 6 through line 12, of the transcript of the proceedings held on April 21, 1983, that:

> "However, bear in mind, if Your Honor will, that samples were taken for the purpose of testing. The results of those tests are available and the people who made the tests are available for cross-examination by the defendant in this case."

Petitioner avers that the test results of the material found in the tank trailer were in fact discovery material in that they were material to guilt and punishment of this defendant. Moreover, the record reveals that the material contained in tank number four (4) of the tank trailer was in fact exculpatory evidence in that the testimony adduced at trial revealed that this tank was contaminated. During direct examination of Mr. Gary Keaton, page 90, line 8 through line 11 of the trial transcript reveal that Mr. Keaton testified as follows:

> "Q. Tank number four sir?
>
> "A. I would classify that as a gasoline but more along the lines of a regular because octanes were not that high; I found this would be maybe contaminated."

Further, during direct examination of Mr. Arvin Vera, page 101, line 14 through 16 of the trial transcript, Mr. Vera testified that:

> "A. Four was a little bit different, they had a little bit heavier material but still was basically gasoline, probably mixture with some kind of diesel."

Above is the only expert testimony as to the contents of the tank trailer. Both witnesses testified that the contents of tank number four of the tank trailer was not pure sweet gasoline as contended by the State. Moreover, the results of these tests were never provided to defendant in spite of his request for discovery material. Adding to the constitutional violation of due process of law in the State's failure to respond to requested discovery material is the court's failure to dispense with the pending motion for discovery prior to trial.

In *State v. Johnson*, 426 So.2d 95 (La. 1983), the Louisiana Supreme Court noted that reversible error results when the undisclosed evidence, considered in the context of the entire record, creates a reasonable doubt that did not exist, also see *United States v. Agurs, supra,* and *State v. Prudholm,* 446 so.2d 729 (La. 1984).

In the present case the State alleges that the contents of the tank trailer were pure sweet gasoline. At trial, the record reveals that tanks one, two, three and five were the only tanks that contained pure gasoline. The contents of tank number four was not pure gasoline and was possibly contaminated with some other substance which gives weight to petitioner's claim that he was hauling waste and/or slop gasoline.

In *U.S. v. Pollack,* 534 F.2d 964 (D.C. Cir. 1976), the court noted that disclosure by the State must be made at such time as to allow the defense to use the favorable material effectively in presentation of its case.

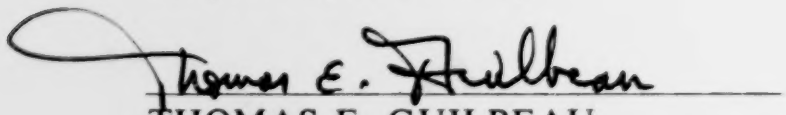
Had the State provided petitioner with the requested discovery material then and only then would petitioner's conviction have been in compliance with the due process clause of the United States Constitution. Moreover, petitioner's defense was grossly prejudiced by the State's failure to respond to his discovery request in that any adequate response by the State may have resulted in a plea of guilty by petitioner had his counsel known the results of chemical testing on the contents of the tank trailer. Further, if defense counsel would have known of these tests he could have conducted his own test to determine the extent of the contaminated material in the tank trailer.

In conclusion, it must be noted that petitioner could not avail himself of the provisions of LSA-C.Cr.P. Art. 729.5, as the court had not ordered the State to comply with the requested discovery material.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Louisiana Supreme Court.

Respectfully submitted,



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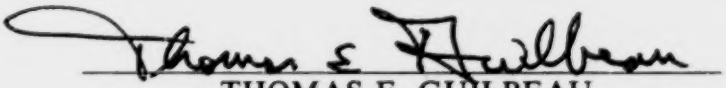
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three copies of the above and foregoing was this day forwarded to all counsel of record by depositing said copies in the U.S. Mail, properly addressed and postage prepaid.

Lafayette, Louisiana, this 13th day of December, 1984.



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